

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CONFIRMATION CASE NO. 1011 OF 1997**

**THE REPUBLIC
VERSUS
ADAM AJIBU**

**In the Second Grade magistrate court sitting at Mangochi
Criminal Case No. 84 of 1997**

**CORAM: Mwaungulu, J
Manyungwa, Principal State Advocate, for the State
Defendant, present, unrepresented
Soka Banda, official interpreter
Marsen, recording officer**

Mwaungulu, J

JUDGMENT

The Honourable Mrs. Justice Msosa set this case down to consider the severity of the sentence passed against the defendant. The defendant was sentenced to three years imprisonment with hard labour when the Second Grade Magistrate at Mangochi convicted him of the offence of theft of a bicycle contrary to section 282 as read with section 278 of the Penal Code. It is the sentence that concerned the reviewing judge. She thought, correctly in my view, that this sentence was manifestly excessive.

As to the factual complexion, there is not much to this case. The defendant borrowed the complainant's bicycle. He never returned it. He had in fact sold the bicycle to somebody else. The bicycle was recovered from a third person who bought it from the defendant. The defendant was convicted after trial.

For the defendant, this was not the first offence. He had been convicted before of a like offence. He was, for that offence, sentenced to one year's imprisonment with hard labour. The sentence was suspended for a period of three years. Before the expiry of the period of suspension, the defendant committed this offence. For reasons not necessary to repeat here the defendant was

treated as a first offender. The court below gave two reasons for the sentence of three years' imprisonment. First, the learned magistrate thought it serious that the bicycle was in a bad state of repair when it was recovered. I do not think that this was important. The defendant would have been punished appropriately if the bicycle had been lost completely. Then, as we will see shortly, the sentence would not have been what the learned magistrate passed. Secondly, the learned magistrate thought it to be an aggravating factor that the bicycle was sold to somebody. The third party has been put to a loss. If a man steals a bicycle and sells it, if the bicycle is not recovered, the loss to the owner is an appropriate consideration when passing a sentence. If the bicycle is recovered from a third party who bought it, there is no loss to the owner. The loss is the third party's. The fair thing to do then is to pass such a sentence as would have been passed if the bicycle had been lost completely. Then the defendant gains nothing from the fact that the bicycle has been recovered and is punished for the full benefit from the crime in selling the stolen bicycle. It would be oppressive in my judgment to punish him overly for the fact that he has put the third party to a loss. For if the loss of the third party is an aggravating factor, it is balanced by that the victim of the crime has not suffered any loss.

The question that arises immediately is that what is the right sentence for theft of a bicycle. Much as sentences are matters of discretion for the trial court, there is much to gain from comparison of sentences passed by other courts of concurrent jurisdiction in the locality or elsewhere. Equally, while decisions of superior courts on sentences are not binding, I, when I was in the lower courts, benefitted from the well of experience of superior courts particularly where a pattern or guideline was proffered. Superior courts tend to look at the broad sentencing patterns across the national spectrum. Their wisdom and guidance on the matters are extremely helpful. In relation to theft of bicycles this court has often been guided by the remarks in *Regina v Paulo* (1923-61) 1 ALR Mal 682,683:

The subject matter of the theft in this case was a bicycle valued at K10. For a first offence of stealing property valued K10 the sentence of twelve months imprisonment with hard labour would, in normal circumstances, be considered to be a high sentence. The very great prevalence of bicycle stealing, however, and the circumstances that a bicycle owned by an African villager such as the complainant in this case represents a very large part of the owner's savings and its loss must be a very serious matter to him, has compelled the Court to impose a sentence in the region of eighteen months imprisonment with hard labour is justified in cases of this kind."

It is wisdom from which none of us, looking at the offence, are prepared to overturn. Clearly the sentence of the court below was manifestly excessive. The sentence is set aside. The defendant will serve a sentence of eighteen months imprisonment with hard labour.

Made in open court this 11th Day of December 1997.

D.F. Mwaungulu
JUDGE